IN THE
SUPREME COURT OF THE UNITED STATES
TERM, 1978
No. ~~77~~-1569

ANTHONY B. CATALDO,

Petitioner,

-against-

DAVID P. LAND, T. GORMAN REILLY
and ROBERT LEVINE,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS,
SECOND CIRCUIT

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and THE ASSOCIATE JUSTICES OF THE
SUPREME COURT OF THE UNITED STATES:

The petitioners, ANTHONY B. CATALDO and ADA W. CATALDO respectfully pray this Court that a writ of certiorari issue to review the decision and judgment of the United States Court of Appeals for the Second Circuit made the 2nd day of February, 1978, unanimously affirming the decision and judgment of the United States District

Court for the Eastern District of New York made June 23, 1977.

OPINIONS BELOW

The opinion of the Court of Appeals has not been reported. Attached hereto is a true copy of the same. It is marked APPENDIX A. The opinion and judgment of the District Court has not been reported. Attached hereto is a true copy of the same marked APPENDIX B. No re-hearing of the opinions or decisions below were sought and no re-hearings were had.

JURISDICTION

The judgment of affirmance of the Court of Appeals was entered February 2, 1978. This petition will be filed within 90 days of that date. Jurisdiction of

this Court is invoked under 28 USC 1254(1).

QUESTIONS INVOLVED

1. Where, in this action to recover compensatory and exemplary damages for fraud and deceit practiced upon the District Court to the prejudice and detriment of petitioners, who were plaintiffs in a tax refund suit against the United States, in the Federal District Court for the Southern District of New York, wherein defendants Land and Reilly were the Assistant-United States Attorneys conducting the defense of that refund suit, and defendant Levine was an Internal Revenue agent, one of those that had audited the books of the plaintiff's husband, a practicing attorney, was the

decision of the District Court dismissing petitioners' complaint for a refund, res judicata or operable as a bar under the doctrine of collateral estoppel to this fraud suit? And, were the allegations showing that the dismissal of the tax refund suit was procured by the fraud and deceit upon the Court by these defendants insufficient to support the complaint for fraud?

2. Was the principle that a Federal Court in a removed case must apply the substantive law of the State in whose court the action was started, properly ignored by the District Court and the Court of Appeals as was done in this case?

CONSTITUTIONAL, STATUTORY AND RULE PROVISIONS INVOLVED

28 U.S.C., Section 1254 reads, in pertinent part:

> "Cases in the Court of Appeals may be reviewed by the Supreme Court in the following methods:
>
> 1. By Writ of Certiorari granted upon the petition of any party to any civil or criminal case * * *."

The Seventh Amendment of the United States Constitution states, in pertinent part:

> "Civil Trials. In a suit at common law, when the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved * * *."

Rule 38(2) of the Rules of Federal Civil Procedure provides, in pertinent part:

> "(a) RIGHT PRESERVED. The right of trial by jury as declared in the

Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate."

Rule 60(b) of the Rules of Federal Civil Procedure reads, in pertinent part:

"Rule 60 Relief from Judgment or order. (b) * * * the court may relieve a party * * * from a final judgment for * * * (3) fraud (whether heretofore denominated intrinsic or extrinsic, misrepresentation, or other misconduct of an adverse party."

Article 1, Section 2, of the New York State Constitution provides, in pertinent part:

"Trial by jury in all cases in which it had heretofore been guaranteed by Constitutional provision shall remain inviolate forever."

Civil Practice Law and Rules, Section 4101 provides, in pertinent part:

"(a) In the following actions, the issues of fact shall be tried by a jury * * * (1) An action in which a party demands and sets forth facts which would permit a judgment for a sum of money only * * *."

Civil Practice Law and Rules,

Section 5015, reads, in pertinent part:

"The court which rendered a judgment or order may relieve a party from it upon such terms as may be just, on motion of any interested person with such notice as the court may direct upon the ground of * * * .

"3. Fraud, misrepresentation, or other misconduct of an adverse party * * *."

Section 487, Judiciary Law of New

York, reads, in pertinent part:

"Section 487. Misconduct of Attorneys. An attorney or counsellor who:
1. Is guilty of any deceit or collusions, with intent to deceive the court or any party

* * *

is guilty of a misdemeanor, and in addition to the punishment prescribed

therefore by the penal law, he forfeits to the party injured treble damages to be recovered in a civil action."

CONCISE STATEMENT OF THE CASE

In 1969, petitioners instituted a suit in the United States District Court for the Southern District of New York for the recovery of $2,718.59 collected from them under an arbitrary and capricious assessment for additional income taxes resulting from a disallowance of certain items of business deductions taken in Schedule C by the lawyer-taxpayer. No other disagreement with the return than the disallowance of the expenses was presented by the Commissioner.

In preparation for the trial, the Government produced Mr. Levine as its witness in a pre-trial discovery deposition.

That witness testified under oath that as part of an audit he had made of the lawyer-taxpayer's books, he examined the lawyer's diary to check the claimed notations of petty cash spent through the year in the return and that he made a tape of those items of less than $25.00 and another tape of items of more than $25.00, and he found that a prior auditor's totals of those amounts were correct. He also testified that two items, one of $1,084.57, and the other of $2,282.50 included in the disallowances made by the Commissioner did not relate to any claims of expenses reported by the taxpayer, but they appeared to have been calculations of the conferee at the Appellate Division, the nature of which he did not understand. He also testified that he had made a report of his findings to the Appellate Division.

Also, the United States was caused to file formal admissions on four separate occasions in respect of specific items of claimed deductions of the taxpayer as a result of which, only a very small number of items remained in dispute. Thus, plaintiffs were hopeful of using these admissions to prove the arbitrariness and capriciousness of the assessment.

The Honorable Richard H. Levet was assigned to try the case. At the first meeting held in chambers, a law assistant, a Mr. Madden appeared to be assisting the Judge. Mr. Madden's interest in this case showed a personal disposition of making disparaging remarks about plaintiffs which tended to prejudice the Judge against plaintiffs' interests. Mr. Madden caused the Judge, among other things at the trial,

to sign a contempt order which untruthfully stated that it was a civil contempt, when it was a criminal contempt; that an order to show cause why the lawyer-taxpayer should not be held for contempt was issued, when there was no such order to show cause ever made, and in causing the order to be signed contrary to the provision of Rule 42(b), Federal Rules of Civil Procedure, providing a hearing on specification of charges which proceedings were never followed. In addition, said Mr. Madden misinformed the Judge about plaintiff-lawyer's engagements in the trials in other cases to force the lawyer-taxpayer to try this case. Mr. Madden failed to inform the Judge about the contents and relevance of plaintiff's memorandum for trial and of certain proferred exhibits,

and even, persuaded the Judge to decide upon an order of trial that was diametrically opposed to the order of trial as set forth in plaintiffs' memorandum. The Judge directed plaintiffs to follow order of trial suggested by Mr. Madden or he would hold plaintiffs in contempt. The plaintiffs did as directed and lost the case, and were held for contempt anyway. By obeying the Judge plaintiffs were obliged to try issues not established under the pleadings and they were deprived of the right to claim that the assessment was arbitrary and capricious. Thus, they were not able to avoid the presumption of the correctness of the assessment, but were forced to try to prove that items admitted by the Commissioner as deductible were deductible, but without any prior notice that defense counsel had disputed the new items. This change of procedure was

effectuated by Mr. Madden and defense counsel (defendants Land and Reilly) colluding to include in defendants' trial memorandum a list of expenses as disputed items that had already been allowed by the Commissioner. The Court directed plaintiff-lawyer to abandon his prepared order of proof and to offer evidence on the deductibility of the items listed in defendant's trial memorandum without amendment of pleadings and irrespective of the rule of cases establishing that it was the Government's burden of proving the correctness of such new items in dispute.

On the trial, defense counsel caused Mr. Levine to commit perjury by inducing him to testify that he had never seen the lawyer's diary, in consequence of which the Trial Court disallowed all petty cash expenses. They caused said Levine to

say that the two disallowances of $1,084.59 and $2,282.50 were duly disallowed by the Commissioner, and they objected to the production of Mr. Levine's report despite a subpoena duces tecum properly served upon Mr. Levine. In fact, they objected to the production of all documents specified in said subpoena. Such objections were unlawful, but through the intervention of Mr. Madden, supporting defense counsels' statements, the Court refused to order the production of the documents requested. Defense counsel also advanced unlawful conceptions of the weight of the evidence in that nothing stated by plaintiff orally was evidence unless supported by writings. As a consequence, defense counsel claimed an impossible quality of proof for items of expenses such as court stenographer's fees and other court charges paid by the

taxpayer. Such expenses were disallowed despite the presentation of the checks in payment. The objection was to the oral testimony identifying the payee as a court reporter and identifying the name of the case in which the cost was incurred. These were but some of the unlawful claims of defense counsel on the trial. There were others, mostly cumulative, but this would add to the weight of the truth of plaintiffs' accusation of collusively engaging with Mr. Madden, or advancing unsound law and untrue facts to the Court by defense counsel, with a tongue-in-cheek attitude, knowing that the Judge would find against the taxpayers and he did, on every occasion. This trial, complete with the finding of the lawyer-taxpayer for contempt and fining him $50.00/ frustrated due process. Plaintiffs were the butt of wilful, intentional, obstructive

tactics by employees of the defendant to interfere with the order of proof of plaintiff's case, to prevent the introduction of evidence, to become the recipient of sarcastic remarks by the Trial Judge and to observe Mr. Madden actively suggesting to the Judge in open court to disregard every oral claim made by the taxpayer.

After the dismissal of the complaint in the refund suit was entered, an appeal was taken. The Court of Appeals affirmed. Later, separate appeals were taken from the order of contempt. They were both dismissed, on motions of the respondent. The second dismissal was for an alleged late filing of the appeal, but it included a statement by the Court of Appeals that it appeared from the arguments that the contempt holding was proper. Why the Court of Appeals

would volunteer such a statement after it had dismissed the appeal is inexplicable, as well as erroneous.

On re-argument, petitioner called to the Court's attention that passing upon the merits upon the basis of oral statements made on the argument instead of the Record was error. Especially, as the Court had decided the appeal was untimely, and it had dismissed the appeal for that reason. The Court of Appeals changed its reasons for upholding the contempt charge by saying that it had referred to the Appendix on the first appeal and found support for its decision. As a participant in that trial, the lawyer-taxpayer knew that there was no contempt of court committed. A petition for a writ to this Court was denied on May 19, 1976. A true copy of this Court's letter of that date is attached hereto and marked APPENDIX C.

Aggrieved and frustrated by the desecration of justice under American law, petitioner sought to sue defense counsel and Mr. Levine as the perpetrators of the crimes of perjury, subornation of perjury, conspiracy to deceive and defraud the Court and the plaintiff, by causing the obstruction of justice in the tax refund suit. Suit was brought in the Supreme Court of the State of New York, in Queens County, the residence of these petitioners. Two causes of action were stated. The first, against the lawyers, Land and Reilly, for violation of Section487 of the Judiciary Law, which forbids lawyers from wilfully deceiving, or consenting to deceive a court to the injury of a party, and if they do, they forfeit treble damages to be recovered in a civil suit. The damages were stated to be $10,000.00 for compensatory damages. Adding $30,000.00

for each defendant made a total of $100,000.00.

The second cause of action states a conspiracy among defense counsel and Levine to defraud the Court and petitioners as a result of the same criminal misconduct, and asks for $30,000.00 from Levine, which is included in the total of $100,000.00 mentioned above. The United States Attorney for the Eastern District of New York removed this state court suit to the United States District Court for the Eastern District of New York under the provisions of 28 U.S.C. 1442. A motion to strike the appearance of the United States Attorney for these defendants was made because of the criminal nature of the action, and because no recovery was asked from the United States of America. Also, the United States Attorney would be acting beyond the scope of his authority

to appear to defend employees charged with criminal conduct when that conduct was not within the scope of the employees' duties. The Court denied the motion. A jury demand was duly made and filed.

Two years of waiting for trial passed when defendants moved to dismiss the complaint for res judicata, collateral estoppel and absolute or qualified privilege, despite the fact that the only defense pleaded was justification because of the claim that what defendants did, they acted in the belief that they were acting in the good faith performance of their duties. Plaintiffs cross-moved for partial summary judgment claiming that there were no denials of the criminal conduct as charged in the first cause of action. The record of the trial showed at least the participation of these lawyers in the perjurious testimony of

Mr. Levine and in their unlawful deception of the Court in claiming the application of law that did not exist and facts that did not exist.

The District Court granted defendants' motion and denied plaintiffs' cross-motion, but it did so on the basis of a misreading of the facts regarding the extent of the action plaintiffs took against the criminal conduct within the tax refund suit. The Court then denied the fraud. Yet, the record shows the perjury and the false claims to untrue facts and inapplicable law, and corroborates the activity of Mr. Madden as stated above. Further, the District Court erred in applying res judicata or collateral estoppel. It did not pass upon the question of privilege. This petition is being filed

to prevent the loss of Constitutional rights at the hands of agents of the United States Government.

REASONS FOR THE GRANT OF THE WRIT

Starting with an assessment of tax that was conceded to be erroneous by its admissions in the pre-trial proceedings, in the tax refund suit, and, going through the criminal misconduct of defense counsel and the Internal Revenue Agent in collusion with a law secretary in the suit for refund, in an obvious effort to win the suit for defense counsel, and, going on through the judicial process which failed to correct the obviously criminally induced results, petitioners were deprived of their Constitutional rights to pay what was a lawful tax, to be heard at the tax office, to be free

from an unlawful assessment and from a criminally conducted trial, and even by a wilful effort at the Court of Appeals level to white-wash the unlawful activity that was called to their attention; and then, when petitioners sought in a direct action to invoke the aid of the State courts, the suit was removed and, after removal, was not called for trial, and two years passed, when a motion to dismiss was made instead of trying the case, and the case was dismissed by allegations of fact by the District Court, that did not exist, and the application of law that did not apply; and yet, such unlawful conduct was upheld by the Court of Appeals. We then have here a return to the status of law prevailing in pre-Magna Carta days. The Constitution guarantees the individual rights against arbitrary government actions. Due process

of law, equal protection of the laws, trial by jury, to name a few. The record will support the right of petitioners to have their day in court, putting before a jury the miserable activities of a few agents who, for their own interests of making a record, would defeat the good intentions of their government to conduct its business according to law. Let us examine the errors of the courts below in this case.

POINT I

THE SUBSTANTIVE LAW OF THE STATE WHERE A SUIT IS BROUGHT MUST BE APPLIED IN A REMOVED SUIT

In a removed case the rule seems to be that the substantive law of the state court from which the case has been removed must be applied.

Cowley v. Northern Pac. R.R. Co., 159 U.S. 569, 582.

De Lima v. Bidwell, 182 U.S. 1.

American Well Works v. Layne, 241 U.S. 257.

Erie v. Tompkins, 304 U.S. 64.

Guaranty Trust Co. v. York, 326 U.S. 99.

Hanna v. Plumer, 380 U.S. 460

General Inv. Co. v. Lake Shore Ry., 260 U.S. 261, 288.

The first cause of action of this complaint is predicated upon the grant of a forfeiture of treble damages by Section 487 Judiciary Law of New York. That Statute and the allegations of the complaint are sufficiently set forth to indicate to defendants the nature of plaintiffs' claim. Neither the District Court, nor the Court of Appeals considered the cause of action

pleaded. This was error in itself.

See also Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530, 69 S.Ct. 1233, 93 L.ed. 1520; Woods v. Interstate Realty Co., 337 U.S. 535, 69 S.Ct. 1235, 93 L.ed. 1524; Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.ed. 1528; Byrd v. Blue Ridge Rural Electric Cooperative, Inc., 356 U.S. 525, 78 S.Ct. 893, 2 L.ed.(2) 953; Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496-497, 61 S.Ct. 1020, 1021, 85 L.ed. 1477, and cf. Allstate Ins. Co. v. Charneski, 286 F.(2) 238.

While these cases talk of the extent that state law shall be applied in the federal forum the right to bring a cause of action for resolution, or in what court it will be presented to, belongs to the plaintiff, see Koratron Company v. Deering

Millikin Inc., 418 F.(2) 1314, 1317, and cases cited; that in the absence of Congressional pre-emption, Federal employees do not have immunity from the operation of state statutes, see 72 Am. Jur., 2nd, Statutes, Section 19; and that defense counsel could not claim immunity from the operative effects of said Section 487 of the Judiciary Law, see Penn Dairies, Inc. v. Milk Control Comm., 318 U.S. 261; Graves v. New York, ex rel O'Keefe, 306 U.S. 466 and Railway Mail Ass'n v. Corsi, 322 U.S. 88 in which cases though not specifically treating with Section 487, this Court said, about obedience to a state statute that, in the absence of prohibition by the Constitution, or an Act of Congress, laws passed by the state in the exercise of its police power reach Federal employees.

While the criminal law of the United States forbids obstruction of justice there are no statutes or other laws in the Federal arsenal comparable to said Section 487 of the Judiciary Law of New York. Hence, these defendants are subject to Section 487, being lawyers and suborning perjury and deceiving the Court to the hurt and detriment of a citizen of the State of New York.
The courts below erred in failing to enforce that law upon which plaintiffs relied as the source of its remedies.

The District Court's references to the complaint was to say that it is a collateral attack upon the judgment in the tax refund suit. Even so, the new complaint states a new cause of action based upon a statutory remedy; see Griffith v. Bank of New York, 147(2) 899, 901. The allegations of the second claim should be considered on

on the motion to dismiss. Painting with a heavy brush and calling it an attack upon a judgment neither makes it so, nor does it give the Court an excuse for applying res judicata or collateral estoppel.

The second claim is akin to the equity suit to set aside a judgment for fraud. Damages are alleged and it is respectfully submitted that it states sufficient facts to warrant a recovery unless the defense of res judicata or collateral estoppel is valid, which they are not.

POINT II

WASN'T THE DEFENSE OF RES JUDICATA AND COLLATERAL ESTOPPEL MISAPPLIED

Res judicata and collateral estoppel cannot apply to the first cause of action as

that claim is nothing like the refund suit, nor are the issues or the parties the same.

Nor does res judicata or collateral estoppel apply to the second claim. Again, because the issues are different.

In the first place res judicata applies only when the causes of action are similar. This is so by definition of res judicata, 46 Am. Jur., 2nd, Judgments, Section 394 says: "That an existing final judgment rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction, is conclusive of causes of action and of facts or issues mainly litigated." Section 404 of the same Am. Jur. says: the bar then applies "to a subsequent action involving the same claim, demand and cause of action." See also Fowler v. National Screen Service, 349 U.S. 322, where this Court specifically says

that res judicata does not apply to a different set of facts in the first suit. See also United Shoes Machinery Corp. v. U.S., 258 U.S. 451, 458, 459; So. Pac. Ry. v. United States, 168 U.S. 1, 48; and United States v. Moser, 266 U.S. 236, 241. The rule is the same under New York law, see New York State Labor Board v. Holland, 294 N.Y. 480; Israel v. Wood Dolson Corp., 1 N.Y.(2) 116, 118; Cook v. Conners, 215 N.Y. 175; Smith v. Kirkpatrick, 305 N.Y. 66; and Plant City Steel Corp. v. National Machine Exchange, 23 N.Y.(2) 472, 475. See, also, Moore's Federal Practice, ol. 1B, Par. 0.405. The District Court relied upon Commr. of Int. Rev. v. Sunnen, 333 U.S. 591; Harris v. Washington, 404 U.S. 55, 56, 92 S.Ct. 183, 184; and Roth v. McAllister Brothers, Inc. 315 F.(2) 43, note proper citation is 316 F.(2) 143.

These cases have nothing in common with the facts of this case, and hence are inapposite. Some language in Sunnen and in Roth is in favor of petitioner's claims.

In fact, the courts below failed to take the issues in both cases apart and lay them side by side to show how they compare and are subject either to res judicata or collateral estoppel. Hence, as a matter of fact, as there was no effort to prove a similarity of issues, claims or parties, error was made. Certainly, the United States Attorneys, or the Internal Revenue agent is not the same as the United States of America, and the reach in the fraud case is the pocket book of the individuals, for their personal acts, and not the Treasury of the Government, nor anything that was lawfully done on behalf of the Government.

Also, the District Court relied on United States v. Throckmorton, 98 U.S. 61, which specifically exempts claims of fraud on the court from being barred by these doctrines. We have seen that Section 394 of Am. Jur., Supra., makes the same exception where the first judgment is procured by fraud. The talk of a difference between Intrinsic-Extrinsic fraud by the District Court was completely at variance with Rule 60(b)(3), F.R.C.P., which eliminates the old practice of making that distinction. In addition to the provision of that part of Rule 60, set forth above, the same rule in the last sentence to subdivision (b) states: "This rule does not limit the power of the court to entertain an independent action * * * to set aside a judgment for fraud upon the court." The Court below denied the efficacy of said language when it

said that petitioner had other relief available to it by other Federal rules of practice, and then, surprisingly, the Court said, generally, that petitioners did avail themselves of relief under the other rules, when there was no proof of any such action in the record before the Court. Prof. Moore, in Vol. 1-b, para. 0.407, confirms that an independent action may be brought to set aside a judgment for fraud, by a fraud upon a court; see p. 932. If an independent action is preserved to a litigant by the Federal Rules, to set aside a judgment for fraud, how can it be said that the judgment to be attacked is res judicata or collateral estoppel to such an attack? Judge Clark, in Griffith v. Bank of New York, Supra, had no difficulty in ignoring res judicata or collateral estoppel in this case. Even if Federal common law

applied to this complaint they would prove that the courts below erred in dismissing this suit before trial.

But, as the sufficiency of this complaint must be considered by the law of the State of New York we find that New York law affords the same relief. Rule 5015(3), C.P.L.R. is set forth above. It permits an attack when the misconduct of a party deceives a court. Such a deception cannot grant a remedy if the judgment can be barred by res judicata or collateral estoppel. In New York the difference between extrinsic-instrinsic fraud has been done away with; see WEINSTEIN-KORN-MILLER, New York Practice, para. 5015.08, 5015.09 and 5015.10, and Levine v. O'Malley, 33 A.D.(2) 874, 307 N.Y.S.(2) 918.

New York rule of res judicata or collateral estoppel is not given effect to a judgment or order obtained by fraud; see Everett v. Everett, 180 N.Y. 452, Perkins v. Guaranty Trust Co., 274 N.Y. 250, 257; and in addition, it allowed a party to recover for a fraud upon the Court, see Verplanck v. Van Buren, 76 N.Y. 247, when perjury was committed. Also, New York law says that the rule of res judicata and collateral estoppel have exceptions. One is where the issues in the second suit have not really been tried. See State Insurance Fund v. Low, 3. N.Y.(2) 590, 170 N.Y.S.(2) 795, and cases there cited. Judge Desmond gives a clear insight into the type of examination of the issues in both suits to show clearly how much justice preponderates in favor of a trial for the new complaint.

The District Court refers to the fact that the trial judge in the tax refund suit rules against plaintiffs on the burden of proof about plaintiffs' claim that defense counsel improperly induced the trial judge to place the burden of proof on plaintiffs. But, the District Court misunderstood plaintiffs' point, plaintiffs' claim was that, where an assessment is proven to be incorrect the presumption of its correction falls. The United States cannot rely on the presumption of correctness of the assessment. In that case, if defense counsel advances any claims for additional taxes resting on matters not contained in the assessment, then the taxpayer proceeds to prove a regularly prepared return and the burden of proving an item to be unallowable is upon the Government; see C.I.R. v. Pacific Mills,

207 F.(2) 177; Lease v. United States, 346 F.(2) 696; and Automobile Club of Mich. v. Comm'r., 230 F.(2) 585. Defense counsel caused this rule to be changed by listing in their trial brief many items of expense not disallowed by the Commissioner which the judge, without discussion, ordered plaintiffs to disprove the new disallowances as though they had been a part of the assessment by the Commissioner. No res judicata or collateral estoppel could arise from this slight of hand by defense counsel. How would the District Judge like it if he were trial counsel and be held in contempt because he dared object to proof on items not contained in the pleadings? How would he like it to have a later judge say that it was all right, because the trial judge had allowed it?

Furthermore, the Court of Appeals, Fifth Circuit, in Kinnear Weed Corp. v. Humble Oil, 403 F.(2) 437, said about res judicata or collateral estoppel, when the propriety of the first judgment was under attack, at pp. 439-440, by Brown J.:

> "But, as we several times made clear, this is a matter which transcendes the interests of the parties. The purity of the judicial process and its institutions is the thing at stake. Whatever might be the usual consequences of res judicata, collateral estoppel or doctrines akin to them, we reject them here. They are not a bar or defense here or below."

The foregoing quotation was read to the Court of Appeals in the Second Circuit, but evidently they would not adopt that rule. Here, then, is a clear case of differences in two circuits that might call upon the Court to hear the appeal in this case, to settle the issue. The issue is important, not only for justice's sake in

avoiding the deprivation of the right of trial on issues raised about the quality of justice in the prior case, but the purity of governance is at stake. Even the credibility of their officers is at stake. Correction should be directed by this Court for this is what life in America is all about. It is a basic raison d'etre of this Honorable Court.

POINT III

PERJURY ENGAGED IN BY GOVERNMENT AGENTS IS NOT CONDONED BY EITHER THE FEDERAL COURTS OR BY THE STATE COURTS.

In New York, its Court of Appeals has established the rule that where a public attorney has suborned perjury or condones it to win a case, that such is a State action and a deprivation of due process, and hence,

remediable; see Goldstein v. Lyons, 290 N.Y. 19; Morhaus v. The Supreme Court of the State of New York, 293 N.Y. 131; Peo. v. Savvides, 1 N.Y.(2) 554; Peo. v. Schwartzman, 24 N.Y.(2) 241; cf. Mooney v. Holohan, 294 U.S. 103, 112-113.

In the Federal courts, in Bell v. Hood, 327 U.S. 678, and in Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, this Court has said, that the violation of Constitutional rights is actionable, despite the absence of an enabling act giving one aggrieved the right to sue for such deprivation.

Also, in the Federal courts, they have exercised their powers to set aside judgments obtained by fraud upon the courts; see Hazel Atlas Co. v. Hartford Co., 322 U.S. 238, 244-246 and cases noted at p. 245. In commenting upon the court's

power to devitalize a judgment obtained by misconduct (perjury), this Court said, at p. 246:

> "Furthermore, tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society."

Also, this Court, in Universal Oil Co. v. Root Rfg. Co., 328 U.S. 575, at p. 580 re-affirmed the power of the Federal Court to unearth fraud in the procurement of a judgment by fraud upon the Court.

Prof. Moore treats the same subject of fraud upon the court at Volume 7, at pp. 505, et seq., starting with the heading of "3. Fraud Upon the Court." It is significant that this Court, in both Hazel Atlas, and in Universal Oil Co., Supra.,

did not stop to apply res judicata or collateral estoppel to bar the inquiry into the means by which the first decisions were entered. This is proof that when fraudulent conduct has induced a judgment of a court, that the corrective measures of the Court are the Supreme Law of the Situation and it applies. The courts below did not apply such law. They erred, because they failed to follow this Court's decisions in the many cases cited hereinabove. In affirming on the opinion of the District Court, the Honorable Court of Appeals was guilty of so far departing from the accepted and usual course of judicial proceedings, or of so far sanctioning such a departure by the lower Court, as to call for the exercise of this Court's power of supervision, just as Rule 19 of the Rules of this Court states.

POINT IV

THE DENIAL OF THE PLAINTIFFS' MOTION TO STRIKE THE APPEARANCE OF THE UNITED STATES ATTORNEY FOR THESE DEFENDANTS WAS ERRONEOUS.

There is nothing about this case that would adversely affect the good of the United States of America. Its good would be promoted by an investigation into the fraudulent conduct of the defendants. Filing an appearance and offering the good offices of the United States Attorney to defend criminal conduct is plainly incongrous and outside the scope of the powers and authorities of that office. It also is unfair to pit unlimited resources against very limited resources. The cases say that, where the pecuniary interests of the United States will not be served by the appearance of the United States, that appearance will be stricken; see United

States v. San Jacinto, 125 U.S. 273 and Calhoun County, Florida v. Roberts, 137 F.(2) 130.

How can the courts below justify their refusal to strike the appearance of the United States Attorney in this case?

CONCLUSION

It is respectfully submitted that, not only have important Constitutional rights been taken from plaintiffs by the collective action of the Federal Government agents mentioned above, but also the decisions in this case are erroneous, and conflict with decisions on similar principles made by the Court of Appeals of other Circuits, and with the decisions of this Court on the many points indicated above, or that the decisions under review so far depart from the usual and

accepted course of judicial proceedings or the decision of the Court of Appeals below, so far sanctions such a departure by the District Court as to call for an exercise of this Court's power of supervision in a matter affecting every taxpayer and the integrity of the United States of America and its courts in dealing with the individual rights, vis a vis, his Government. Furthermore, this matter will provide an opportunity to discipline Government agents, instead of condoning their criminal misconduct, and then hiding behind the facade of doing what they did for the Government. The public will be greatly relieved to know that this Court will say that they cannot escape from the consequences of their criminal misconduct, and that this Court will vindicate its decision in Berger v. United States, 295 U.S. 78. Last, but not

least, the credibility of the Internal Revenue and of the enforcing officers in the Department of Justice will be enhanced, with the knowledge that this Court will not brook or overlook dishonest practices. Honesty as a policy of job performance might be encouraged. This Honorable Court is respectfully requested to grant its writ of certiorari to the Court of Appeals, Second Circuit.

Respectfully submitted,

ANTHONY B. CATALDO
Attorney for Appellants,
and Pro Se

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 2d day of February,

one thousand nine hundred and seventy-eight.

Present:

HON. PAUL R. HAYS

HON. MURRAY I. GURFEIN,

Circuit Judges

HON. FREDERICK vanPelt BRYAN, District Judge*

ANTHONY B. CATALDO and ADA W. CATALDO, Appellants,	:	
-against-	:	77-6109
DAVID P. LAND, T. GORMAN REILLY and ROBERT LEVINE, Appellees.	:	

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by appellants pro se and counsel for appellees.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is AFFIRMED generally on the opinion of Chief-Judge Mishler below.

PAUL R. HAYS

MURRAY I. GURFEIN
Circuit Judge

FREDERICK vanPelt BRYAN,
District Judge

*United States District Judge for Southern District of New York, sitting by designation.

APPENDIX B

DECISION GRANTING DISMISSAL OF ACTION AND DENYING CROSS-MOTION

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - - - -

ANTHONY B. CATALDO and
ADA CATALDO,

Plaintiffs,

-against-

DAVID P. LAND, T. GORMAN
REILLY and ROBERT E. LEVINE,

Defendants.
- - - - - - - - - - - - - - - - - -

74 C 1774

Memorandum of Decision and Order

June 22, 1977

A P P E A R A N C E S :

For Plaintiffs

ANTHONY B. CATALDO, ESQ., Pro Se
111 Broadway
New York, New York 10006

For Defendants

HONORABLE DAVID G. TRAGER
UNITED STATES ATTORNEY
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201
David W. McMorrow, Esq., Of Counsel
Assistant United States Attorney

MISHLER, CH. J.

An Internal Revenue Service ("IRS") audit of the Cataldos' 1963 joint tax return resulted in a $2,210.87 deficiency assessment which, along with $507.62 in interest, plaintiffs subsequently paid under protest. After a claim for the full amount was rejected by the IRS, plaintiffs commenced a refund action in the United States District Court for the Southern District of New York. Defendants David P. Land and T. Gorman Reilly, both Assistant United States Attorneys, were jointly responsible for the government's defense. The case proceeded to trial in May, 1973, and lasted for three days. In an opinion filed on June 29, 1973, the court granted judgment in favor of the government and dismissed plaintiffs' claim with prejudice. That judgment was affirmed by the Court of Appeals in a per curiam decision on June 25, 1974. Cataldo v. United States, 501 F. 2d 396 (2d Cir. 1974).

In November, 1974, plaintiffs commenced the instant action;[1] the complaint charges defendants Land, Reilly and Robert E. Levine, the IRS agent in charge of the Cataldo tax audit, with conspiring to defraud the court during the trial of the tax refund suit. In brief, plaintiffs allege that Levine wrongfully disregarded a subpoena duces tecum and testified perjuriously in the refund trial while defendants Land and Reilly suborned such perjury, advised Levine to ignore the subpoena, and consistently misrepresented the applicalbe law and operative facts to the court. Plaintiffs claim that defendants' alleged wrongdoing constituted obstruction of justice and caused dismissal of their suit.

For this, the Cataldos seek $10,000 in compensatory, and $90,000 in punitive damages. Defendants move, pursuant

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[1] The action, originally filed in State Supreme Court, Queens County, was removed to this court on December 16, 1974, pursuant to 28 U.S.C. 1442 (a) (1) and (3).

pursuant to Rule 12(c) F.R.Civ.P., for judgment on the pleadings or, in the alternative, for an order pursuant to Rule 56(b) F.R.Civ.P. granting summary judgment. Plaintiffs, in turn, cross move for summary judgment.

Allegations of Misrepresentation

Although the IRS initially allowed a $2,230.23 deduction constituting petty cash items of less than $25, the government decided to later contest the amount at trial. Defendants Land and Reilly argued that the government was by no means estopped from making the challenge, and that the burden of proof on this, as with every claimed deduction in a refund action, remained with the taxpayer. Plaintiffs, while disputing the defendants' right to challenge previously allowed expenditures, argued that the government bore the burden of proof with respect to these additionally contested items. The court sustained the government's position. Cataldo now argues that the defendants deliberately misrepresented the posture of the law causing the burden to be cast on him, and,

in turn, his failure.

Allegations of Wrongfully Disregarding A Subpoena

Prior to the commencement of the refund trial, plaintiffs served upon Agent Levine a subpoena demanding the production of all IRS memoranda and records pertaining to the Cataldo audit. Defendants refused to produce the requested items arguing irrelevancy and confidentiality. The court, upholding defendant's position, did not order that the records be furnished. Plaintiffs continue, however, to insist that defendants wrongfully failed to respond to the subpoena duces tecum.

Decision

There exist several avenues of relief from judgments procured through "fraudulent" conduct. Not only does the right of direct appeal lie, but the Federal Rules of Civil Procedures allow for post trial motions which call for additional findings,

see Rule 52(b), for relief from a judgment resulting from fraud or other misconduct, see Rule 60(b), or for a new trial, see Rule 59. Capitalizing on several of these means, plaintiffs raised precisely the same allegations of wrongdoing, not only in the original refund trial, but in a post trial motion to amend the complaint and reopen the proceedings, and again on appeal. The very allegations were specifically rejected by both the trial and appeals courts. Nevertheless, plaintiffs once again assert the same claims. Although their action is styled as one for damages against individual government officials, it is in reality a collateral attack on the judgment rendered in the prior tax refund suit. For the gravamen of their complaint is that the district court would not have dismissed plaintiffs' action but for the alleged wrongdoing of the defendants. Both the rule against collateral attack of valid judgment and the doctrine of

collateral estoppel bar maintenance of this suit.

Fraud that is intrinsic to the prior judicial proceeding will support neither an independent action collaterally attacking the previous judgment, United States v. Throckmorton, 98 U.S. 61, 68 (1878); Serzysko v. Chase Manhattan Bank, 461 F.2d 699, 702 (2d Cir. 1972), nor an action for damages against the alleged wrongdoers. Griffith v. Bank of New York, 147 F.2d 899, 903 (2d Cir. 1945). There is little question that the fraud alleged by plaintiffs was intrinsic to the tax refund proceeding. It is clear that the information which forms the basis of plaintiffs' claims was in their possession at the time of the Southern District trial. And not only were they presented with the opportunity to raise those allegations, which itself is sufficient to bar a collateral attack, Serzysko v. Chase Manhattan Bank,supra

at 702 n.2, they in fact exercised the opportunity. It is evident, therefore, that this action cannot be maintained given the absence of other evidence of fraud.

Moreoever, the doctrine of collateral estoppel bars relitigation of plaintiffs' claims. Traditionally defined, parties to a second suit involving a different cause of action are estopped from contesting those matters which were in issue and necessarily determined in a previous suit between them or their privies. Commissioner of Internal Revenue v. Sunnen, 333 U.S. 591, 597-98, 68 S.Ct. 715, 719 (1948); Harris v. Washington, 404 U.S. 55, 56, 92 S.Ct. 183, 184 (1971); Roth v. McAllister Brothers, Inc., 315 F.2d 143, 145 (2d Cir. 1963). For the defense to attach, three elements need be present: (1) the issues sought to be raised in the second action must have been judicially determined in the prior action; (2) there must have been a final judgment on the merits

in the prior suit; and (3) the party against whom the defense is asserted must have been a party to, or in privity with the party to the previous action. Kraeger v. General Electric Co., 497 F.2d 468, 471-72 (2d Cir.), cert. denied, 419 U.S. 861, 95 S.Ct. 111 (1974); Citizens for Community Action at Local Level, Inc. v. Ghezzi,386 F. Supp. 1, 5 (W.D.N.Y. 1974), vacated on other grounds; Town of Lockport, N.Y. v. Citizens for Community Action at Local Level, Inc., 423 U.S. 808, 96 S.Ct. 11 (1945). There can be no question that all three elements are present here.

Throughout the course of the trial and again in a post trial motion, plaintiffs repeatedly asserted that defendants Land and Reilly had misrepresented the law, "wrongfully" reporting to the court that the burden of proof lay with plaintiffs. In each instance plaintiffs' claims were rejected. So too, plaintiffs charged both at trial and in subsequent motions that defendant Levine had committed perjury at Land and Reilly's urgings. The court heard Levine's testimony

and Cataldo's cross-examination and made appropriate findings. Failing to prevail on any of their claims in the trial court, plaintiffs raised the same allegations on appeal. There again plaintiffs' contentions were rejected, the court finding that the Cataldos were afforded a fair trial. The identity of parties and issues presented in the instant action precludes relitigation. [2]

Accordingly, defendants' motion to dismiss is granted and plaintiffs' cross-motion for summary judgment is denied. The Clerk of the Court is directed to enter judgment in favor of defendants and against plaintiffs dismissing the complaint with prejudice, and it is

SO ORDERED.

U.S.D.J.

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[2] Finding sufficient grounds to support the dismissal of plaintiffs' suit in the doctrine of collateral estoppel and the rule against collateral attack of a valid judgment, we need not reach defendants' additional claims

that the action is barred by the doctrine of quasi-judicial immunity and qualified official immunity or that plaintiffs' allegations do not give rise to cause of action for damages.

APPENDIX C

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

Anthony B. Cataldo, Esq.
111 Broadway
New York, N.Y. 10006

RE: CATALDO v. UNITED STATES, 75-1248

Dear Sir:

The Court today entered the following order in the above-entitled case:

The motion for leave to file a petition for a writ of certiorari is denied.

Very truly yours,

Michael Rodak, Jr., Clerk
By

Helen Taylor (Mrs.)
Assistant Clerk

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

MAY [illegible] 1976

Anthony B. Cataldo, Esq.
111 Broadway
New York, N.Y. 10006

RE: CATALDO v. UNITED STATES, 75-1248

Dear Sir:

The Court today entered the following order in the above-entitled case:

The motion for leave to file a petition for a writ of certiorari is denied.

Very truly yours,

Michael Rodak, Jr., Clerk
By
Helen Taylor
Helen Taylor (Mrs.)
Assistant Clerk

No. 77-1569

In the Supreme Court of the United States

OCTOBER TERM, 1977

ANTHONY B. CATALDO and ADA W. CATALDO, PETITIONERS

v.

DAVID P. LAND, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1569

ANTHONY B. CATALDO and ADA W. CATALDO, PETITIONERS

v.

DAVID P. LAND, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioners seek $100,000 in compensatory and punitive damages against respondents David P. Land and T. Gorman Reilly, who are Assistant United States Attorneys, and Robert Levine, a Revenue Agent of the Internal Revenue Service. Land and Reilly represented the government in an income tax refund suit brought by petitioners, and Levine was in charge of the audit underlying that suit. This suit is based upon petitioners' contention that respondents' conduct in connection with the refund suit was fraudulent. The district court found (Pet. App. B, pp. 50-60) that petitioners had failed to establish that respondents had acted fraudulently and held that they could not collaterally attack the judgment in that suit in favor of the government. The district court further held that the present action was barred by collateral estoppel. The court of appeals affirmed without opinion (Pet. App. A, pp. 48-49).

The pertinent facts, which are set forth in the district court's opinion (Pet. App. B, pp. 51-52), are as follows: An audit of petitioners' income tax returns for 1963 resulted in an assessment of $2,210.87, plus interest, for failure to substantiate various claimed deductions. Agent Levine supervised the audit. Petitioners paid the assessment under protest and instituted a refund action. After a trial, in which respondent Levine testified, and in which respondents Land and Reilly represented the government, the district court entered judgment for the government. The court of appeals affirmed *per curiam* (501 F. 2d 396), and this Court denied petitioners' motion for leave to file a petition for a writ of certiorari (Pet. App. C, p. 61).

Petitioners subsequently brought this action in the United States District Court for the Eastern District of New York claiming that respondents Land and Reilly committed fraud by arguing in the refund suit that petitioners bore the burden of proving their entitlement to various deductions even though the Internal Revenue Service had not contested those items administratively. In the refund suit, the district court sustained the government's position that petitioners had the burden of proof with respect to each item at issue (Pet. App. B, pp. 53-54).[1] Petitioners also alleged that prior to the refund suit Levine wrongfully refused to produce certain Internal Revenue Service documents relating to the audit. The district court ruled that the records did not have to be produced (Pet. App. B, p. 54).

The courts below correctly held that petitioners' action for damages against the revenue agent, and the government attorneys who defended against their tax refund suit was barred by collateral estoppel. Here, all three elements

[1]See, *e.g.*, *Helvering* v. *Taylor*, 293 U.S. 507, 514-515; *Lewis* v. *Reynolds*, 284 U.S. 281.

necessary for the application of collateral estoppel were met: (1) the same issues litigated in the refund suit were sought to be litigated in this suit; (2) the judgment in the refund suit was final and on the merits; and (3) the party against whom the defense of collateral estoppel is asserted is the same as or in privity with one of the parties in the prior adjudication (see *Blonder-Tongue Laboratories* v. *University of Illinois Foundation*, 402 U.S. 313, 323-324). Since the courts in the tax refund suit ruled against petitioners on each of the claims that they renew in this action for damages, they are collaterally estopped from further litigating these identical issues.

While the courts below had no occasion to reach the question (Pet. App. B, pp. 59-60 n. 2), respondents Land and Reilly, who participated in the refund suit as Assistant United States Attorneys, are at all events immune from suit as quasi-judicial officers. *Imbler* v. *Pachtman*, 424 U.S. 409; *Flood* v. *Harrington*, 532 F. 2d 1248 (C.A. 9). Respondent Levine is similarly immune whether the proper standard is one of absolute (*Barr* v. *Matteo*, 360 U.S. 564) or qualified (*Scheuer* v. *Rhodes*, 416 U.S. 232) immunity. Levine's testimony in court in connection with his audit was within the course of his official duties and he acted in good faith. Thus, even under a qualified immunity standard, requiring only a good faith belief that the conduct was proper and a reasonable basis for that belief, Levine was likewise immune from suit. *E.g.*, *Jones* v. *United States*, 536 F. 2d 269, 271-272 (C.A. 8); *Bryan* v. *Jones*, 530 F. 2d 1210 (C.A. 5) (*en banc*), certiorari denied, 429 U.S. 865; *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 456 F. 2d 1339, 1347-1348 (C.A. 2).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

JUNE 1978.

DOJ-1978-06

No. 77-1569

In the Supreme Court of the United States

October Term, 1977

ANTHONY B. CATALDO and ADA W. CATALDO,
Petitioners,

v.

DAVID P. LAND, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM IN REPLY

ANTHONY B. CATALDO
Attorney for Petitioner
and pro se
Office and P.O. Address
111 Broadway
New York, N.Y. 10006
212-962-0965

No. 77-1569

In the Supreme Court of the United States

October Term, 1977

ANTHONY B. CATALDO and ADA W. CATALDO
Petitioners,

v.

DAVID P. LAND, ET AL.
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT

MEMORANDUM IN REPLY

QUESTIONS INVOLVED

1.) Have respondents failed to meet the charge of perjury made by petitioner and the effects of such criminal conduct on this litigation? Obviously, yes, as respondents say nothing about the perjury committed by Levine and suborned by the government's attorneys, Land and Reilly.

ARGUMENT IN REPLY

Petitioner has submitted to this court a copy of Appellant's appendix filed in the Court of Appeals. An underlying reason for such filing was the fact that in enumerating the ways in which District Judge Levet was deceived, in the tax refund action, the facts of deception as stated in the petition to this court may not have clearly established the perjury and subornation of perjury which was one of the basic facts upon which this suit was predicated. Petitioner will now clarify how the record shows that perjury was committed and suborned.

The first topic of perjury was the denial on the trial by Levine that he had ever seen a lawyer's diary which petitioner-lawyer had testified was the record of his petty cash expenditures for the year in question. Petitioner had testified that the government auditor had gone through the diary and had allowed some $2,200 of expense and disallowed about $1,500 of such ex-

pense because the disallowed items were for more than $25 each, while the allowed items were for less than $25 each. Petitioner was claiming that the disallowance was arbitrary because the notations in the diary showed the amount and the purpose of the expense. That was an issue under the pleadings of the tax refund suit.

At the trial, the government listed in its trial memorandum that even the $2,200 should be disallowed. This was the first notice had by petitioner of such claim. There were no amendments to the government's anwer.

Petitioner testified that he no longer had the diary, because it was found missing in 1972 after he had moved his offices from John Street to Broadway in Manhatten. The diary had been in a drawer of his desk, which desk he had the movers take to their showroom for resale. The moving was done in petitioner's absence, for, at the time, he was in Lenox Hill Hospital for

observation for a possible stroke. See pp. 26-27.

In support of the items that had been contained in the diary, petitioner had planned to use a listing of the items he had taken from the diary at the time he had made out the income tax return. The list was written onto yellow sheets of paper, usually found in pads in law offices.

Both the diary and the sheets of yellow paper were exhibited and turned over to the auditor, and later to the Appellate Division of Internal Revenue. Agent Levine was required by the Appellate Division to re-audit petitioners books. When Levine made his audit, he was given the diary. He took taps of the diary entries.

On the trial, Levine testified that he had never seen a diary, a lawyer's diary, that he had seen a yellow sheet of paper instead, see pp. 67 and 68 of Appendix. Levine had also

testified at a pre-trial deposition as a witness for the government. There he stated, that he had been given the diary at the time of his audit and had taken taps of the items of expense, see pp. 23-26 and 73-78.

Also Levine stated at the trial that two items disallowed by the Commissioner, one of $1,084.57 and the other for $2,282.58 were properly disallowed, see p. 28. But on the said deposition, he had stated they were not related to deductions and were irregular. Relying on this latter statement, petitioners had hoped to prove that the assessments were incorrect and arbitrary and not entitled to the presumption of correctness. But, at the trial, the government claimed that petitioners had the burden of proof throughout, of the correctness of the expenditures and convinced the court to apply that unlawful rule.

The government also objected to the list of expense as had been prepared as stated above

and objected to petitioners testimony about the loss of his diary. Both were excluded. In its memorandum after trial, the government argued that both the items under $25 and those over $25 should be disallowed and they were. Accordingly, petitioners felt that as a result of the perjury, and its subornation, and the unlawful objections made by government counsel, aided by the subversive action of Mr. Madden, with collusive intent to deceive the Court, he lost his case for a refund. Yet, petitioner had paid monies upon an assessment that clearly rested upon arbitrary action of the commisioner. The issues, at trial, were unlawfully reshuffled by defense counsel making, in the government's trial memorandum, new claims of items of expenses disallowed, without notice to petitioner.

The question is, may the government's representatives rest upon perjured testimony to win a case for a tax refund, and escape their liability for such criminal conduct? Wasn't the

taxpayer denied due process by the proceedings followed at the trial? At least, it has been established by this Court in Hazel Atlas v. Hartford, 322 U.S. 325 that such actions would nullify the judgment in the tax refund suit. Then, why should res judicata or collateral estopple as found by the courts below, operate to defeat this suit? Aren't these questions within the ambit of the supervisory powers of this honorable court over the performance of Federal Courts, generally, and in particular, over a fraud action arising out of judgment rendered unlawful by fraud and deceit practiced upon the Court? Doesn't the supervisory power of this court extend over the performance of the government in the prosecution of its tax claims? Wouldn't a recognition by this court of the necessity to set aside a judgment fraudulently obtained by the government, reaffirm to the American people that the government is righteous and will not misuse its courts to win a tax

case?

Respectfully submitted,

ANTHONY B. CATALDO
Attorney for himself and
his wife, co-petitioner.